

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
-vs-	:	Criminal No. 3:01cr227 (PCD)
	:	
TONINO REYES MAUGE-ANTHONY	:	

**RULING ON DEFENDANT’S MOTION TO DISMISS THE
INDICTMENT AND MOTION TO STRIKE ALIASES**

Defendant Tonino Reyes Mauge-Anthony moves to dismiss the one-count indictment claiming that a charge of reentry by a removed alien in violation of 8 U.S.C. § 1326(a) & (b)(2) may not be predicated upon deportation proceedings that violated his right to due process. Defendant also moves pursuant to FED. R. CRIM. P. 7(d) for an order striking the aliases listed in the caption under his name on his indictment. For the reasons set forth herein, the motions are denied.

I. BACKGROUND

Defendant was convicted on September 5, 1989, of unlawfully carrying a weapon, a misdemeanor, in violation of TEX. PENAL CODE ANN. § 46.02 and sentenced to 180 days imprisonment. On November 13, 1989, defendant was convicted of unauthorized use of a vehicle in violation of TEX. PENAL CODE ANN. § 31.07 and was sentenced to a suspended term of seven years imprisonment and to seven years probation. On December 19, 1990, defendant’s probation was revoked and he was ordered to serve his seven-year sentence.

On January 29, 1990, the Immigration and Naturalization Service (“INS”) notified defendant that his conviction for unlawfully carrying a weapon rendered him subject to deportation pursuant to § 241(a)(14) of the Immigration and Nationality Act. On May 6, 1991, the INS again notified defendant

of a deportation hearing. The two notices differed only in the relevant section for which defendant was subject to deportation, changing the reference from § 241(a)(14) to § 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(C). On December 11, 1991, defendant was ordered deported. Defendant did not appeal the order. On May 3, 2000, defendant was deported to Panama.

On July 23, 2001, the INS received a report that defendant was to appear before the Connecticut Superior Court judicial district of Danielson. On August 16, 2001, the INS identified the individual before the Connecticut Superior Court as defendant. On September 20, 2001, an indictment was filed charging defendant with reentering the United States on August 16, 2001, after his deportation on May 3, 2000, in violation of 8 U.S.C. § 1326(a) & (b)(2). The caption to the defendant's name in the indictment includes thirteen aliases.

II. MOTION TO DISMISS INDICTMENT

Defendant asserts that the removal proceedings violated his right to due process because his counsel did not appeal the decision and the Immigration Judge presiding stated that defendant had neither a basis to seek relief from deportation nor a basis for appeal. The government responds that defendant failed to meet his burden of collaterally attacking the lawfulness of the deportation order as required by 8 U.S.C. § 1326(d).

Defendant is charged with a violation of 8 U.S.C. § 1326(a), reentry by a removed alien, which provides in relevant part: "any alien who . . . has been . . . deported . . . and thereafter . . . is at any time found in . . . the United States . . . shall be fined . . . or imprisoned not more than 2 years, or both." Collateral attack on the deportation is permissible where the alien is deprived of the right to judicial review of the disposition of the deportation hearing when such disposition is used to establish an

element of the offense. *United States v. Fares*, 978 F.2d 52, 56 (2d Cir. 1992). Collateral attack is, however, precluded unless the defendant demonstrates (1) exhaustion of administrative remedies available; (2) the deportation proceedings at which the order issued deprived the defendant of an opportunity for judicial review; and (3) the entry of the deportation order was fundamentally unfair. 8 U.S.C. § 1326(d). As the three elements are conjunctive, the defendant's collateral attack fails if any element is not satisfied.

Assuming, arguendo, that defendant could satisfy the first two elements of 8 U.S.C. § 1326(d), he cannot satisfy the third. In order to mount a successful challenge to a due process challenge to the lawfulness of the deportation proceedings, a defendant must establish that he was prejudiced by the denial of judicial review. *United States v. Paredes-Batista*, 140 F.3d 367, 378 (2d Cir. 1998). This correlates with the requirement that defendant demonstrate that the deportation be "fundamentally unfair" pursuant to 8 U.S.C. § 1326(d). There is no prejudice when "a fully informed exercise of the right of direct appeal would have yielded the alien no relief from deportation." *Fares*, 978 F.2d at 57. Defendant therefore "must make a prima facie showing that he would have been eligible for the relief and that he could have made a strong showing in support of his application." *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994). This he cannot do.

Defendant asserts that he was eligible for discretionary relief under § 212(c) and was thus prejudiced by the unavailability of judicial review of his deportation order. Defendant was convicted on September 5, 1989, of unlawfully possessing a weapon. On December 11, 1991, defendant was

ordered deported pursuant to § 241(a)(2)(C).¹

Whether discretionary relief may be sought from the Attorney General under § 212(c) for a deportation ordered pursuant to § 241(a)(2)(C) is settled law. In *Cato v. INS*, 84 F.3d 597, 602 (2d Cir. 1996), involving an appeal of a deportation order issued on December 12, 1991 based on a conviction for possession of a weapon, the Court concluded that “an alien, deported on the ground of a weapons conviction, is ineligible for § 212(c) relief.” Defendant therefore cannot substantiate a claim of prejudice as *Cato* forecloses the possibility of discretionary relief of the deportation order by the Attorney General under § 212(c). The motion to dismiss the indictment is denied.

III. MOTION TO STRIKE ALIASES

Defendant moves to strike the thirteen aliases included in the caption under his name in the indictment, asserting that the aliases are inflammatory, prejudicial and unnecessary. The government responds that defendant’s aliases are relevant to the charge and should remain in the indictment because defendant has failed to establish that the references are prejudicial.

Surplusage may be stricken from an indictment pursuant to FED. R. CRIM. P. 7(d). “Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and are inflammatory and prejudicial.” *United States v. Hernandez*, 85 F.3d 1023, 1030 (2d Cir. 1996) (internal quotation marks omitted). Furthermore, “[i]f the Government intends to introduce evidence of an alias and the use of that alias is necessary to identify

¹ The relevant law for purposes of determining whether the denial of judicial review prejudiced defendant is the Immigration Act as it existed on December 11, 1991. See *Rabiu*, 41 F.3d at 882.

the defendant in connection with the acts charged in the indictment, the inclusion of the alias in the indictment is both relevant and permissible, and a pretrial motion to strike should not be granted.”

United States v. Clark, 541 F.2d 1016, 1018 (4th Cir. 1976).

In the present case, the Government asserts that it intends to introduce defendant’s use of aliases at trial as “inextricably intertwined with the proof regarding the charged offense.” Defendant’s claim that “[t]here is little likelihood that the defendant’s identity will be an issue at trial” does not render the aliases irrelevant and thus properly the subject to a motion to strike. *See Hernandez*, 85 F.3d at 1030. Moreover, the government’s intention to introduce evidence of defendant’s use of aliases similarly weighs against granting the motion. *See Clark*, 541 F.2d at 1018. Defendant’s motion to strike is therefore denied.

IV. CONCLUSION

Defendant’s motion to dismiss the indictment (Doc. 11) is **denied**. Defendant’s motion to strike aliases (Doc. 14) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, December ___, 2001.

Peter C. Dorsey
United States District Judge